

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 400 Session of 2009

INTRODUCED BY LENTZ, BELFANTI, M. SMITH, EACHUS, BARBIN, BARRAR, BRENNAN, BRIGGS, BUXTON, CALTAGIRONE, CARROLL, CIVERA, CONKLIN, D. COSTA, P. COSTA, CRUZ, DALEY, DeLUCA, DePASQUALE, DeWEESE, DIGIROLAMO, DRUCKER, J. EVANS, FRANKEL, FREEMAN, GALLOWAY, GEORGE, GERBER, GERGELY, GIBBONS, GODSHALL, GOODMAN, GRUCELA, HALUSKA, HARKINS, HORNAMAN, JOSEPHS, W. KELLER, KIRKLAND, KORTZ, MANDERINO, MANN, MARSHALL, McCALL, McGEEHAN, McILVAINE SMITH, MELIO, MICOZZIE, MUNDY, MURPHY, MURT, MUSTIO, MYERS, M. O'BRIEN, PASHINSKI, PAYTON, PERZEL, PETRARCA, PETRI, PRESTON, SABATINA, SANTARSIERO, SEIP, SIPTROTH, SOLOBAY, STURLA, J. TAYLOR, VEREB, WAGNER, WALKO, WANSACZ, WHITE, YOUNGBLOOD, BURNS AND BOYLE, MARCH 19, 2009

AS REPORTED FROM COMMITTEE ON LABOR RELATIONS, HOUSE OF REPRESENTATIVES, AS AMENDED, APRIL 27, 2009

AN ACT

1 Providing for the criteria for independent contractors in the
2 construction industry; and imposing penalties.

3 The General Assembly of the Commonwealth of Pennsylvania
4 hereby enacts as follows:

5 Section 1. Short title.

6 This act shall be known and may be cited as the Construction
7 ~~Industry Independent Contractor~~ WORKPLACE FRAUD Act. ←

8 Section 2. Legislative intent.

9 The General Assembly finds that increasingly employers in the
10 construction industry are improperly classifying employees as
11 independent contractors or paying unreported compensation in
12 order to evade THEIR RESPONSIBILITIES AS EMPLOYERS WITH RESPECT ←

1 TO compliance with Federal and State laws. These actions ALSO ←
2 deprive these workers of Social Security benefits and other
3 benefits, including overtime pay, while reducing the employers'
4 Federal and State tax withholdings and related obligations.
5 These practices put employers that bear higher business costs
6 for complying with applicable law at a competitive disadvantage
7 with those who do not follow the law. ~~In order to restrict and ←~~
8 ~~eliminate these actions the General Assembly sees the need to~~
9 ~~enact legislation to specifically address these issues.~~ IN ORDER ←
10 TO RESTRICT THESE ACTIONS, THE GENERAL ASSEMBLY HEREBY FINDS THE
11 NEED TO ENACT CLEAR STATUTORY GUIDELINES FOR THE CONSTRUCTION
12 INDUSTRY TO DEFINE THE DIFFERENCE BETWEEN AN INDEPENDENT
13 CONTRACTOR AND AN EMPLOYEE FOR PURPOSES OF APPLICABLE LAWS. THE
14 GENERAL ASSEMBLY FURTHER FINDS A NEED TO ENACT STIFF CRIMINAL
15 AND CIVIL PENALTIES FOR EMPLOYERS WHO KNOWINGLY AND
16 INTENTIONALLY MISCLASSIFY EMPLOYEES AS INDEPENDENT CONTRACTORS
17 IN ORDER TO ENSURE THAT THE PRACTICE IS NOT FINANCIALLY
18 ADVANTAGEOUS TO THOSE EMPLOYERS AS THEY COMPETE AGAINST
19 EMPLOYERS THAT ARE IN COMPLIANCE WITH THE LAW.

20 Section 3. Definitions.

21 The following words and phrases when used in this act shall
22 have the meanings given to them in this section unless the
23 context clearly indicates otherwise:

24 "Construction." ~~Construction~~ ERECTION, reconstruction, ←
25 demolition, alteration, modification, ~~erection~~, custom ←
26 fabrication, BUILDING, ASSEMBLING, SITE PREPARATION AND repair ←
27 work or maintenance work done on any real property or premises
28 under contract, whether or not the work is for a public body and
29 paid for from public funds.

30 "Department." The Department of Labor and Industry of the

1 Commonwealth.

2 "Employer." The term includes any individual, partnership,
3 association, joint stock company, corporation, business trust or
4 any other person or groups of persons acting directly or
5 indirectly in the interest of an employer in relation to an
6 employee and who is engaging in or performing services in the
7 commercial or residential building construction industry for
8 remuneration.

9 "Minimum Wage Act." The act of January 17, 1968 (P.L.11,
10 No.5), known as The Minimum Wage Act of 1968.

11 "REMUNERATION." ALL COMPENSATION INCLUDING, BUT NOT LIMITED ←
12 TO, WAGES AND EMPLOYEE BENEFITS PAID TO AN EMPLOYEE.

13 "Secretary." The Secretary of Labor and Industry of the
14 Commonwealth or the secretary's authorized representative.

15 "Unemployment Compensation Law." The act of December 5, 1936
16 (2nd Sp.Sess., 1937 P.L.2897, No.1), known as the Unemployment
17 Compensation Law.

18 "Wage Payment and Collection Law." The act of July 14, 1961
19 (P.L.637, No.329), known as the Wage Payment and Collection Law.

20 "Workers' Compensation Act." The act of June 2, 1915
21 (P.L.736, No.338), known as the Workers' Compensation Act.

22 Section 4. Certain services deemed employment and exceptions.

23 (a) General rule.--For purposes of the Minimum Wage Act, the
24 Wage Payment and Collection Law, the Unemployment Compensation
25 Law and the Workers' Compensation Act, an individual engaging in
26 or performing services in the commercial or residential building
27 construction industry for remuneration is presumed to be an
28 employee unless:

29 (1) the individual has been and will continue to be free
30 from control or direction over performance of such services

1 both under the contract of service and in fact; and

2 (2) as to such services, the individual is customarily
3 engaged in an independently established trade, occupation,
4 profession or business.

5 (b) Independent contractor criteria.--An individual engaging
6 in or performing services in the commercial or residential
7 building construction industry for remuneration shall be deemed
8 an independent contractor if the individual can demonstrate, by
9 credible evidence, that the individual meets all of the
10 following criteria:

11 (1) Maintains a separate business location that is
12 separate from the location of the person or entity for whom
13 services are being performed, with the individual's own
14 office, and operates with owned or leased equipment and other
15 facilities. For purposes of this paragraph, an office may be
16 maintained in the individual's residence if the individual is
17 licensed to perform the specific kind and quality of work
18 required by the contracts specified in this subsection by all
19 State and local licensing authorities.

20 (2) Operates under contracts which are in writing and
21 which contracts articulate plainly the precise terms of
22 payment for work performed, the scope of work to be performed
23 and a specific prohibition on the retention by the
24 independent contractor of any other independent contractor to
25 perform any part of the work described in the contract UNLESS ←
26 AN INDEPENDENT CONTRACTOR MUST SUBCONTRACT A PORTION OF THE
27 WORK BECAUSE THE WORK IN QUESTION FALLS OUTSIDE THE SCOPE OF
28 THE INDEPENDENT CONTRACTOR'S NORMAL COURSE OF BUSINESS AND
29 REQUIRES SPECIAL TOOLS OR EXPERTISE, AND IS NOT FOR THE
30 PURPOSE OF SUPPLEMENTING THE INDEPENDENT CONTRACTOR'S WORK

1 FORCE.

2 (3) Includes income and losses from services rendered on
3 a Federal income tax schedule as an independent business or
4 profession.

5 (4) Incurs the main expenses related to the work.

6 (5) Is responsible for the satisfactory completion of
7 the work and is liable for a failure to complete the work.

8 (6) Realizes a profit or loss under contracts to perform
9 work.

10 (7) The success or failure of the individual's business
11 depends on the relationship of business receipts to
12 expenditures.

13 (8) Has through ownership, or a written and executed
14 leasing arrangement with a person other than the employer,
15 the tools, equipment and other assets necessary to perform
16 the services.

17 (9) Makes services available to other businesses,
18 governmental agencies in this Commonwealth or to the general
19 public through business advertising, solicitation or other
20 marketing efforts reasonably calculated to obtain new
21 contracts to provide similar services.

22 (10) Has continuing or recurring business liabilities or
23 obligations.

24 (11) Performs the services through a business in which
25 the individual has a principal proprietary interest.

26 (12) Is a United States citizen or is authorized under
27 Federal law to work in the United States, as defined under
28 section 274A of the Immigration and Nationality Act (66 Stat.
29 163, 8 U.S.C. § 1324a).

30 (c) Factor not to be considered.--The failure to withhold

1 Federal or State income taxes or pay unemployment compensation
2 taxes with respect to an individual's remuneration shall not be
3 considered in determining whether the individual is an
4 independent contractor for purposes of the Unemployment
5 Compensation Law or the Workers' Compensation Act.

6 (d) Construction.--For purposes of this section, each
7 employment relationship shall be considered separately.

8 Section 5. Improper classification of employees.

9 (a) Offense defined.--An employer, or officer or agent of an
10 employer, commits a violation of this act if the employer,
11 officer or agent fails to properly classify the individual as an
12 employee with the intent of evading the requirements of the
13 Minimum Wage Act, the Wage Payment and Collection Law, the
14 Unemployment Compensation Law or the Workers' Compensation Act
15 and shall be subject to the penalties, remedies or actions
16 contained in this act.

17 (b) Enforcement.--When the secretary finds that an employer
18 has violated a provision of this act, the secretary may refer
19 the matter to the Office of Attorney General for investigation
20 and prosecution. Nothing in this act shall be deemed to limit
21 the authority of the Attorney General to investigate and
22 prosecute violations of this act.

23 (c) CONCURRENT JURISDICTION TO PROSECUTE.--THE ATTORNEY
24 GENERAL SHALL HAVE CONCURRENT PROSECUTORIAL JURISDICTION WITH
25 THE DISTRICT ATTORNEY OF THE APPROPRIATE COUNTY FOR VIOLATIONS
26 UNDER THIS SECTION AND ANY CRIME ARISING OUT OF THE ACTIVITY
27 PROHIBITED BY THIS SECTION. NO PERSON CHARGED WITH A VIOLATION
28 OF THIS SECTION BY THE ATTORNEY GENERAL SHALL HAVE STANDING TO
29 CHALLENGE THE AUTHORITY OF THE ATTORNEY GENERAL TO PROSECUTE THE
30 CASE, AND, IF A CHALLENGE IS MADE, THE CHALLENGE SHALL BE



1 DISMISSED, AND NO RELIEF SHALL BE AVAILABLE IN THE COURTS OF
2 THIS COMMONWEALTH TO THE PERSON MAKING THE CHALLENGE.

3 (D) Conspiracy by other parties.--A party that does not meet
4 the definition of "employer" in section 3, but which contracts
5 with an employer knowing the employer intends to misclassify
6 employees in violation of this act shall be subject to the same
7 penalties, remedies or other actions as the employer found to be
8 in violation of this act.

9 Section 6. Criminal penalties.

10 (a) Knowing violation.--

11 (1) An employer, or officer or agent of the employer,
12 that knowingly violates section 5(a) commits a felony of the
13 third degree and shall, upon conviction:

14 (i) be sentenced to pay a fine of not more than
15 \$15,000 or imprisonment for not more than three and one-
16 half years, or both, for a first offense; and

17 (ii) be sentenced to pay a fine of not more than
18 \$30,000 or imprisonment for not more than seven years, or
19 both, for a subsequent offense.

20 (2) An employer, or officer or agent of the employer,
21 that, after being sentenced under paragraph (1)(i), knowingly
22 violates section 5(a) may be subject to a stop-work order, as
23 determined by the secretary pursuant to section 8.

24 (b) Summary offense.--An employer, or officer or agent of
25 the employer, that negligently fails to properly classify an
26 individual as an employee under section 5(a) commits a summary
27 offense and shall, upon conviction, be sentenced to pay a fine
28 of not more than \$1,000. Evidence of a prior conviction under
29 this subsection shall be admissible as evidence of knowledge
30 under subsection (a).

1 Section 7. Civil actions and remedies.

2 ~~(a) Debarment and order to show cause. If the secretary~~ ←
3 ~~receives information indicating that an employer, or officer or~~
4 ~~agent of the employer, has knowingly and intentionally violated~~
5 ~~this act, or has been convicted of a violation of this act, the~~
6 ~~secretary shall issue an order to show cause why the individual~~
7 ~~should not be found in violation of this act and subject to~~
8 ~~debarment. An individual served with an order to show cause~~
9 ~~shall have a period of 20 days from the date the order is served~~
10 ~~to file an answer in writing. If the individual fails to file a~~
11 ~~timely and adequate answer to the order to show cause, the~~
12 ~~secretary shall issue an immediate debarment or immediately~~
13 ~~assess penalties as provided in this section, or both. The~~
14 ~~secretary shall notify all public bodies in this Commonwealth of~~
15 ~~the name of the employer, and no contract shall be awarded to~~
16 ~~the employer or to any firm, corporation or partnership in which~~
17 ~~the employer has an interest until a period of up to three~~
18 ~~years, as determined by the secretary, has elapsed from the date~~
19 ~~of the notice.~~

20 (A) DEBARMENT.--IF THE SECRETARY RECEIVES INFORMATION ←
21 INDICATING THAT ANY EMPLOYER, OR OFFICER OR AGENT OF THE
22 EMPLOYER, HAS INTENTIONALLY FAILED TO PROPERLY CLASSIFY AN
23 EMPLOYEE AND HAS BEEN CONVICTED OF THE VIOLATION, THE SECRETARY
24 SHALL NOTIFY ALL PUBLIC BODIES OF THE NAME OF THE EMPLOYER, AND
25 NO CONTRACT SHALL BE AWARDED TO THE EMPLOYER OR TO ANY FIRM,
26 CORPORATION OR PARTNERSHIP IN WHICH THE EMPLOYER HAS AN INTEREST
27 FOR A PERIOD OF UP TO THREE YEARS, AS DETERMINED BY THE
28 SECRETARY, HAS ELAPSED FROM THE DATE OF NOTICE TO THE PUBLIC
29 BODIES. ACTIONS TAKEN UNDER THIS SUBSECTION SHALL BE SUBJECT TO
30 THE PROVISIONS OF SECTION 9(A).

1 (b) Administrative penalties.--As an alternative to or in
2 addition to any other sanctions provided by law for a violation
3 of this act, when the secretary finds that an employer has
4 violated this act, the secretary is authorized to assess and
5 collect administrative penalties up to a maximum of \$2,500 for
6 the first violation and up to a maximum of \$5,000 for each
7 subsequent violation. When determining the amount of the penalty
8 imposed because of a violation, the secretary shall consider
9 factors which include the history of previous violations by the
10 employer, the seriousness of the violation, the good faith of
11 the employer and the size of the employer's business. Each
12 employee misclassified by the employer shall constitute a
13 separate offense.

14 (c) Actions by employees.--An individual who has not been
15 properly classified as an employee may bring a civil action for
16 damages against the employer for knowingly and intentionally
17 failing to properly classify the employee. An individual's
18 representative, ~~including a labor organization,~~ may bring the ←
19 action on behalf of the individual or as a class action. The
20 court may award attorney fees and other costs of the action in
21 addition to damages to an individual or class of individuals who
22 have not been properly classified as employees in violation of
23 section 5(a).

24 Section 8. Stop-work orders.

25 (a) Issuance of order.--If the secretary determines, after
26 notice and hearing, that an employer, or officer or agent of the
27 employer, has knowingly and intentionally failed to properly
28 classify an individual as an employee under section 5, the
29 secretary may issue a stop-work order requiring the cessation of
30 all business operations OF THAT EMPLOYER AT EACH SITE AT WHICH A ←

1 VIOLATION OCCURRED within 72 hours of the determination. The
2 order shall take effect when served upon the employer or, for a
3 particular employer worksite, when served at the worksite. The
4 order shall remain in effect until the secretary issues an order
5 releasing the stop-work order or upon finding that the employer
6 has properly classified the individual as an employee. The
7 employer shall file with the department periodic reports for a
8 probationary period that shall not exceed two years that
9 demonstrate the employer's continued compliance with this
10 section. The department shall promulgate rules and regulations
11 to determine filing times and report requirements. ACTIONS TAKEN ←
12 UNDER THIS SUBSECTION SHALL BE SUBJECT TO THE PROVISIONS OF
13 SECTION 9(A).

14 (b) Applicability of orders.--Stop-work orders under
15 subsection (a) and penalties under subsection (c) shall be in
16 effect against any successor corporation or business entity that
17 has one or more of the same principals or officers as the
18 employer against whom the stop-work order was issued and which
19 is engaged in the same or equivalent trade or activity.

20 (c) Penalty.--The secretary shall assess a penalty of \$1,000
21 per day against an employer for each day that the employer
22 conducts business operations that are in violation of a stop-
23 work order issued under this section.

24 Section 9. Procedure.

25 (a) Hearings.--Actions taken under sections 7 and 8 are
26 subject to the right of notice and adjudication and the right of
27 appeal in accordance with the provisions of 2 Pa.C.S. (relating
28 to administrative law and procedure).

29 (b) Subpoena powers.--The department has the power to
30 subpoena witnesses, administer oaths, examine witnesses and take

1 testimony or compel the production of documents. Upon
2 application of an attorney for the Commonwealth, the department
3 may issue a subpoena to compel the production of the documents,
4 computer records and information relating to compliance with the
5 act.

6 Section 10. Commonwealth Court.

7 The secretary may seek enforcement of any order or subpoena
8 in the Commonwealth Court.

9 Section 11. Certain agreement prohibited.

10 (A) VIOLATION.--No person shall require or request that an
11 individual enter into an agreement or sign a document which
12 results in the misclassification of the individual as an
13 independent contractor or otherwise does not accurately reflect
14 the relationship with the employer.

15 (B) PENALTY.--A VIOLATION OF SUBSECTION (A) SHALL BE
16 PUNISHABLE BY A FINE OF NOT LESS THAN \$1,000, NOR MORE THAN
17 \$2,500. EACH VIOLATION SHALL BE CONSIDERED A SEPARATE OFFENSE
18 UNDER THIS SECTION.

19 Section 12. Retaliation for action prohibited.

20 It shall be unlawful for an employer or any other party to
21 discriminate in any manner or take adverse action against any
22 person in retaliation for exercising rights protected under this
23 act. Rights protected under this act include, but are not
24 limited to, the right to file a complaint or inform any person
25 about an employer's noncompliance with this act and the right to
26 inform any person of the person's potential rights and to assist
27 the person in asserting those rights. Any person who in good
28 faith alleges noncompliance with this act shall be afforded the
29 rights provided by this act, notwithstanding the person's
30 failure to prevail on the merits. Taking adverse action against

1 a person within 90 days of the person's exercise of rights
2 protected under this act shall raise a rebuttable presumption of
3 having done so in retaliation for the exercise of those rights.

4 SECTION 13. AVAILABILITY OF INFORMATION. ←

5 THE DEPARTMENT SHALL CREATE A POSTER FOR JOB SITES WHICH
6 OUTLINES THE REQUIREMENTS AND PENALTIES UNDER THIS ACT AND SHALL
7 MAKE THE POSTER AVAILABLE ON ITS INTERNET WEBSITE. AT THE
8 DISCRETION OF THE SECRETARY, A TOLL-FREE HOTLINE TELEPHONE
9 NUMBER MAY BE ESTABLISHED TO RECEIVE ALLEGED VIOLATIONS.

10 Section ~~13~~ 14. Use of penalty funds. ←

11 Any assessments and penalties collected pursuant to this act
12 shall be applied toward implementation, enforcement and
13 administration costs incurred by the department under this act.
14 However, the secretary may transfer an agreed-to amount of
15 moneys collected to the Attorney General to assist in the
16 enforcement of this act.

17 Section ~~14~~ 15. Rules and regulations. ←

18 The department may promulgate rules and regulations necessary
19 to implement and administer this act.

20 Section ~~15~~ 16. Annual report required. ←

21 The department shall submit an annual report to the General
22 Assembly by March 1 of the year following the first full year in
23 which this act is in effect, and each year thereafter,
24 detailing, to the maximum extent possible, data on the previous
25 calendar year's administration and enforcement of this act. The
26 department may include any relevant facts and statistics that it
27 believes necessary into the content of the report.

28 Section ~~16~~ 17. Applicability. ←

29 This act shall not be construed to bring an individual within
30 the scope of the Minimum Wage Act, the Wage Payment and

1 Collection Law, the Unemployment Compensation Law or the
2 Workers' Compensation Act if the individual is excluded from the
3 scope of the appropriate statute.

4 Section ~~17~~ 18. Severability. ←

5 The provisions of this act are severable. If any provision of
6 this act or its application to any individual or circumstance is
7 held invalid, the invalidity shall not affect other provisions
8 or applications of this act which can be given effect without
9 the invalid provision or application.

10 Section ~~18~~ 19. Construction of law. ←

11 Nothing contained in this act shall be construed to impair or
12 affect in any manner the ability of the department to carry out
13 the powers and duties prescribed by the laws of this
14 Commonwealth or to adopt measures to improve the enforcement of
15 other laws of this Commonwealth.

16 SECTION 20. FINDING. ←

17 THE DEPARTMENT SHALL COMMENCE IMPLEMENTATION OF THIS ACT TO
18 THE EXTENT THE SECRETARY DETERMINES SUFFICIENT FUNDS ARE
19 AVAILABLE OR THE GENERAL ASSEMBLY APPROPRIATES ADDITIONAL FUNDS
20 FOR PURPOSES OF THIS ACT.

21 Section ~~19~~ 21. Effective date. ←

22 This act shall take effect in 90 days.